NO. 10

UNITED STATES

Memoran

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TO : Mr. A. H. Belmont

DATE: September 16, 1960

FROM : Mr. F. J. Baumgardner

SUBJECT: SUBVERSIVE ACTIVITIES CONTROL BOARD v.
COMMUNIST PARTY, USA
INTERNAL SECURITY ACT OF 1950

By memorandum dated September 14, 1960, you were advised of the filing of the first "Friend of the Court" brief on behalf of the Communist Party, USA (CPUSA), in connection with the case against the Party under the Internal Security Act of 1950 which is pending before the Supreme Court and is scheduled for oral argument October 10, 1960. This first brief was filed by the American Civil Liberties Union and was based solely upon the claim that the registration provision of the Internal Security Act of 1950 violates the First Amendment to the Constitution because it interferes with expression of opinion that is far removed from incitement to violence or any other danger that Congress has power to prevent.

The Washington Field Office has now furnished a Photostat of the second "Friend of the Court" brief filed on behalf of the CPUSA in this case. This brief, prepared by Attorneys Royal W. France of New York and Laurent B. Frantz of California, is based upon the claim that the Internal Security Act of 1950 is unconstitutional on the following grounds:

1. It violates the exercise of rights protected by the First Amendment.
2. It rests on findings which are beyond congressional power.
3. It authorizes ideological trials and penalizes beliefs, opinions and attitudes which are not evidenced by overt acts and,
4. The Act is not justified by any special danger or emergency.

ENCLOSURE

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Enclosure
100-372598

EBR:djd
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1 - Mr. Parsons
1 - Mr. DeLoach
1 - Mr. McGuire
1 - Mr. Belmont
1 - Mr. Baumgardner
1 - Mr. Reddy

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Memorandum to Mr. Belmont
Re: Subversive Activities Control Board v.
Communist Party, USA
100-372598

The introduction to the brief states that the 401 persons who have affixed their signatures to the brief have the profound conviction that it is their liberties, and not just those of the Communist Party, USA, on which the court is being asked to rule. Therefore, the signers desire to present the evils of the Internal Security Act of 1950 from the point of view of noncommunists.

OBSERVATIONS:

This brief is the product of a wide-spread campaign which the CPUSA has been conducting in connection with this case and with two Smith Act cases which are also scheduled for oral argument before the Supreme Court on October 10, 1960. A check of the signatures affixed to the brief reveals that most of the signers are ministers (denominations not listed) or professors (colleges or universities not identified). Many of the signatures are recognizable as those of individuals who have signed all types of petitions on behalf of the CPUSA in the past.

RECOMMENDATION:

That the attached brief be routed to the Records and Communication Division in order that the names of the 401 signers may be appropriately indexed.

100-372598-932

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 12

COMMUNIST PARTY OF THE UNITED STATES,
Petitioner,

vs.

SUBVERSIVE ACTIVITIES CONTROL BOARD,
Respondent.

BRIEF FOR *AMICI CURIAE*

ROYAL W. FRANCE,
Attorney for Amici Curiae,
154 Nassau Street,
New York 38, N. Y.

LAURENT B. FRANTZ,
Of Counsel,
936 Shevlin Drive,
El Cerrito, California.

Adams Press Corp., 82 Beekman Street, N. Y.—Beekman 3-1050-51

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BRIEF FOR *AMICI CURIAE*

Introduction

The undersigned, as counsel for the *amici curiae* whose names are hereto attached (Appendix A), respectfully submit the accompanying brief. This brief is being filed with the written consent of all parties to the case, in accordance with Rule 42, subd. 2 of the Rules of this Court. Communications from the attorney for the petitioner and from the Solicitor General of the United States, expressing their consent to the filing, are printed in Appendix B.

This brief is a revision and expansion of one which was submitted when this case was originally before the Court at the October Term, 1955. The motion for leave to file the original brief was granted by this Court. 350 U. S. 859.

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Before proceeding to our argument, we think it appropriate to say a few words in explanation of the desire of the persons on whose behalf this brief is submitted to participate, as *amici curiae*, in this proceeding.

Any American may be or may wish to become a member of an organization which may fall within the purview of the Act. We submit, therefore, that every American has an interest in the outcome of this case which is both real and direct. Every American, if the Act is upheld, may well hesitate to remain or become a member of, or a contributor to, any organization which is accused, or might be accused, under the Act's provisions. The Act establishes a barrier of non-association with any person who espouses "dangerous" causes and non-association in the affairs of any organization which espouses, or might espouse, controversial views.

The Act itself destroys the very democratic processes which, in another type of case, we would be asked to rely on for the redress of our grievances against legislative action. We therefore fall back on the power and duty of this honorable Court to enforce our written Constitution by keeping the powers of the Government from being expanded beyond the limits assigned them in that document.

We are aware that this solution of the problem gives rise to a procedural difficulty. On the one hand, the nature of the problem is such, and its bearing on the rights of every citizen so great and immediate, as to suggest that every interested individual ought to have a right to be heard before the tribunal charged with responsibility for the final decision. On the other hand, the judicial process is adapted to hearing the claims of a small number of persons whose involvement in the immediate problem makes them parties before the court. The device of the *amicus curiæ* brief resolves this problem as well as we are able to resolve it. It permits us to express, in a form traditional and ap-

propriate to the judicial process, our profound conviction that it is our liberties—and not just those of the Communist Party—on which the Court is being asked to rule. Moreover, no matter how ably the attorneys for the Communist Party may present the case, it is their right and duty to present it from the point of view of, and with reference to its effect on, the Communist Party and Communists. We desire to present the evils of the Act from the point of view of non-Communists. Nor, we submit, is our presentation premature because different questions might arise in the application of the Act to organizations other than the Communist Party. The Act must be judged and its constitutionality determined in the light of its total impact and that impact is not limited by the details of this, or any other, particular proceeding.

A summary of the points to be made is contained in the index of the brief.

Preliminary Statement

The undersigned submit this brief in the profound conviction that decision of the present case is one of the most momentous constitutional responsibilities which has ever been thrust upon this Court.

Presented for the Court's decision is the constitutional validity of the Subversive Activities Control Act of 1950. This, of course, is the short title which Congress has assigned to those provisions of the Internal Security Act of 1950, constituting Title I of that Act, as amended (50 U. S. C. Secs. 781-798), which undertake to define "Communist-action," "Communist-front," and "Communist-infiltrated" organizations, which impose a variety of sanctions on those organizations and their members, which set up procedures and a tribunal by which any voluntary association of private citizens in the United States can be subjected to a political trial, and which impose on the

tribunal created to hold such trials a significant series of prejudgments.

This Act, we believe and will try to demonstrate more fully below, has two principal features. The first is that it imposes penalties and civil disabilities on American Communists, designed to destroy their movement as completely as possible, not for plotting violent revolution, not even for "advocating" it, not for anything they are found guilty of having done or said, not even for being "foreign agents," as that term is ordinarily understood, but simply for allegedly being associated with Communists of other countries in an international movement and for sharing the ideas of Communists of other countries, especially, of course, those of the Communist Party of the Soviet Union.

Since this aspect of the Act will be argued to the Court by parties to the record, we will focus our attention chiefly on the Act's second principal feature. This is that it represses the organizational activities of non-Communist Americans whenever they are found to have associated with Communists for any purpose, however innocent, to have collaborated with Communists for the attainment of any objective, however lawful and proper, or to have agreed with Communists concerning ideas and policies, even though the points of agreement may have been very remote indeed from the particular ideas and policies for which the Communists are assertedly condemned.

This, it seems to us, is nothing less than the legislation of a new orthodoxy. It is an orthodoxy of non-association with any person who is, or might become, suspect, of non-participation in the affairs of any organization which espouses, or might espouse, controversial views. Above all, it is an orthodoxy of non-deviation from the policies and proposals of those who, on any issue, most loudly and successfully contend that whoever does not agree with them must agree with the Communists and hence must be pro-

Communist. This would indeed produce "the unanimity of the graveyard." *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 641.

The great controversial issues of the day—the very issues on which we stand most in need of free, fearless and uninhibited discussion—are characteristically two-sided issues. There are conscientious Americans on both sides of each of them. In conformity with our traditions, we cannot assume that either side has acquired a monopoly of truth or that the other has nothing to say which it would be to our benefit to hear. Yet, as the late Professor Chafee has aptly demonstrated (63 Harvard Law Review 1382; THE BLESSINGS OF LIBERTY (1956) pp. 153-154), the effect of the Act is to make one side of each of these questions a dangerous point of view for an organization to embrace, while leaving the other side untouched.

As is well known, and as the record in this case demonstrates, the Communist Party has taken or is likely to take a position on one side or the other of every great controversial question of public policy. A religious or peace organization which urged the outlawing of atomic weapons, or continued efforts to end the "cold war" by negotiation, could be supporting a "Communist" objective. So would one which attacked as unrealistic, futile and self-defeating the policy of non-recognition of the de facto government of China and of continuing to exclude it from the United Nations. So would one which urged an expansion of public medicine or social security benefits, or support of this Court's decisions in the field of racial segregation, or repeal of the Internal Security Act of 1950. By the reasoning which underlies this Act, the side for which the Communists express a preference becomes automatically the Communist side. The existing organizations on that side must thenceforth change their views, disband, or risk being required to stand trial before the Subversive Activities Control Board on a charge of "non-deviation." The formation of new

organizations on that side becomes so difficult and hazardous that it is discouraged at the outset. Organizations, existing or proposed, which espouse the other side of each of these questions incur no corresponding burden. Instead, the silencing effect on their potential opposition tends to give them an automatic monopoly in the market place of ideas.

In our complexly interlocking society, exposed daily and hourly to the opinion-shaping influence of press, radio, television and other media of mass communication, the idea which is denied organized expression, while its rival enjoys these advantages, has no chance in the market place, whatever its intrinsic merit. The practical effect, therefore, is to suppress one side of each of these questions and to erect the other into a semi-official compulsory creed.

This is no chimera, for already the forces which produced this Act have carried us far along that road. Already, on many of the issues of the day, we have seen beginning to develop a safe and orthodox side, which the prudent espouse out of prudence with little examination, and a dangerous and "subversive" side, which only the bold care to listen to, read or examine. Just at the moment when this tendency is, happily, beginning to subside, this Act, if the Court upholds it, will freeze that tendency and convert it into an institution.

The Congress which adopted this Act thereby expressed its understanding that the current danger to our institutions is that the American people will judge ideas on their merits, rather than on the political backgrounds and associations of those who express them. This indiscretion, the Act seems to say, may cause them to be lured by handsome strangers with no security clearance into dark byways where they will be seduced by false doctrines and persuaded to betray their country.

We submit that, not only is this opinion without rational foundation, but even its irrational foundation has long since passed away. The real and present danger is that the sudden rise in the world of a powerful ideology, rival to our own, and the fears, hatreds, frustrations and confusions generated by this unexpected and unexplained phenomenon, may cause us to lose sight of the meaning of our own heritage and to destroy it in the name of defending it. This Act, we feel, brings precisely that danger to a profound crisis, perhaps to a turning point.

This danger threatens loss of liberty more gravely and more imminently than any minority political movement could ever threaten it. The danger, however, may not be limited to loss of liberty. Involved also is the fact that we are being urged—and, by this Act, compelled—to stake our survival on methods which history has shown have little survival value. We are asked to meet the challenge of the rival world ideology by becoming rigid and unbending, though history has shown that societies which cannot bend are not so much strong as brittle. We are urged to close ranks around our own ideology by adopting a coerced conformity. Yet the principal result of coerced conformity in other countries has been to destroy the delicate and complex machinery by which the mistakes that fallible leaders and statesmen must necessarily make can be detected and corrected before it is too late. We submit that the world of mid-Twentieth Century is not one in which even the world's strongest country should wish to walk blindfolded.

It is with these considerations in mind that we respectfully submit, for the Court's consideration, the following brief.

ARGUMENT

I

The Act is unconstitutional as an overhanging threat to, and prior restraint on, the exercise of rights protected by the First Amendment.

We think it unnecessary to dwell at length on a demonstration that, whatever conduct is reached by this Act is not merely regulated, but is penalized most severely—one might even say savagely.

Affected organizations are compelled to publish, when they publish anything, an estimate of themselves which, in the context of our time, must necessarily do them incalculable damage. Sec. 10 (50 U. S. C. Sec. 789). They are required to publish this in a form which resembles, as much as possible, a voluntary declaration representing their own opinion of their nature and purpose. Yet it may well amount to compulsory self-defamation, since those who believe in the organization and desire to see it continued may very well be the ones who stubbornly refuse to share the Board's opinion that it is "a Communist organization." Whether they share it or not, they are required to express it or be silent altogether, under extremely heavy criminal penalties. Sec. 15(c) (50 U. S. C. Sec. 794(c)). They are even required to express this opinion in a manner (putting it on the outside wrapper, as well as on the material itself) which could not conceivably serve any function or purpose except to frighten recipients into requesting that their names be removed from the mailing list.

If an organization which has fallen under the Board's ban desires to publish any opinion whatever, however moderate and reasoned, on any subject whatever, from social security to what ought to be done about the hydrogen bomb, it cannot do so without attaching to that opinion a

label. This label, whether justifiably or not, will be widely understood as a declaration that the enclosure is Communist propaganda and that social security (or whatever the organization desires to advocate) is "Communistic." That a given program is "Communistic" is typically the view, not of organizations formed to promote the program, but of the program's most fiery and irreconcilable opponents. Yet, in effect, it is *this* view, not its own, which the organization is required to publish—or be silent.

The labeling provisions of the Act are closely analogous to the device of compulsory arm-band identification, to which this Court has had occasion to refer. *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 402. And they have been aptly described by Professor Chafee: "This novel stigma on enterprises which have violated no law recalls the practice of medieval princes to require Jews to wear special marks or colors on their coats." (63 Harv. L. Rev. 1382, 1384; THE BLESSINGS OF LIBERTY (1956) p. 149).

Compulsory political stigmatization is far more repressive in its practical effect than a mere requirement that a handbill bear the name and address of the individual responsible, yet the latter was recently condemned by this Court in the following terms:

> There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression * * *
>
> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. *Talley* v. *California*, 362 U. S. 60, 80 S. Ct. 536, 538.

Organizations which fall under the Board's ban are denied tax exemptions for which they may otherwise be eligible, and their efforts to raise money through contributions are placed under a severe handicap by denial of tax exemption to such contributions. Sec. 11 (50 U. S. C. Sec. 790). This result will frequently follow from the fact that they have expressed ideas or policies which, though perfectly lawful in themselves, become evidence of "non-deviation" because Communists had said something similar. The Act is therefore a use of the taxing power to restrain the expression of such ideas. *Speiser* v. *Randall*, 357 U. S. 513.

Solely for their membership in disapproved organizations, the Act bars an incalculable number of persons from employment by the government, by a "defense facility," or by a labor union. Sec. 5 (50 U. S. C. Sec. 784). The government is already our largest employer. Production in any major industry might affect the nation's ability to defend itself. Thus the doors close automatically to an enormous fraction of the labor market. If the term "defense facility" is broadly interpreted this can be expanded to cover very nearly the whole of it. It must be remembered also that many of the persons affected will be dependent for employment on special skills, knowledge or experience for which there is no demand outside the closed area. This is punishment of a most severe kind. *United States* v. *Lovett*, 328 U. S. 303. It is a proscription many times more sweeping than that involved in *Ex parte Garland*, 4 Wall. 333, and *Cummings* v. *Missouri*, 4 Wall. 277.

We put to one side as of little practical importance the distinction between members of "Communist-action" organizations, who are prohibited from accepting or retaining employment in a "defense facility," and members of "Communist-front" organizations who, "in seeking, accepting, or holding" such employment, must not "fail to disclose" their membership. The distinction is without a difference

under the circumstances. If the atmosphere were such that the employee could entertain substantial hope of being employed despite such a revelation, the Act would not have been passed.

Condemned organizations are required to file reports identifying all their contributors and, in the case of "Communist-action" organizations, their members as well. Sec. 7 (50 U. S. C. Sec. 786).

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as * * * (other forms of governmental action held invalid) * * * This Court has recognized the vital relationship between freedom to associate and privacy in one's associations * * * Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs. *National Ass'n for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449, 462.

It is obvious that individuals identified in such reports would be severely jeopardized in their ability to retain current or obtain future employment, their chances of being admitted to licensed professions, and in many other ways. They would also, if listed as members, incur automatic disabilities under the Act itself. Secs. 5 and 6 (50 U. S. C. Secs. 784, 785). The reporting requirement would therefore operate as a powerful restraining influence on persons who might wish to join, remain members of, or contribute to organizations formed to advocate perfectly lawful ideas and programs. This restraining influence would affect not only organizations actually compelled to register, but also others which had merely been accused before the Board, and still others which had not even been accused, but which merely might be. Under such circumstances, the reporting

requirement is clearly an invasion of constitutional freedom to engage in association for the advancement of beliefs and ideas. *National Ass'n for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516.

It is true that the sanctions discussed above are apparently inapplicable to "Communist-infiltrated" organizations, since the Act does not require the latter to register. However, the face of the Act makes it plain that the "Communist-infiltrated" category is aimed primarily, if not exclusively, at labor unions. Unions found to fit this category are subject to virtual outlawry, since they are forbidden to carry on the most important functions which a union exists to fulfill, Sec. 13A(h) (50 U. S. C. Sec. 792a(h)), and procedures obviously aimed at their displacement by rival organizations are set up. Sec. 13A(i) (50 U. S. C. Sec. 792a(i)).

This Court has already recognized that, even without such sanctions, an official governmental designation of an organization as subversive severely cripples, if it does not proscribe it. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123. The designation plus the sanctions plainly attains the level of proscription by indirection. Chafee has pointed out that the total effect "virtually outlaws" affected organizations. (63 Harv. L. Rev. 1382, 1384; THE BLESSINGS OF LIBERTY (1956) p. 150). And Congress itself has impliedly recognized right in the text of the Act that it was known to have, and intended to have, a highly penal effect. It is provided that the names of individuals shall not be published until they have had notice and an opportunity to deny the organizational connection. Sec. 9(b) (50 U. S. C. Sec. 788(b)). An elaborate procedure is set up by which those able to prove non-membership in the affected organizations can get their names struck from the official blacklist. Secs. 7(g), 13(b), 13(i), 14(a) (50 U. S. C. Secs. 786(g), 792(b), 792(i), 793(a)). If the Act

were genuinely regulatory, rather than punitive in substance and intent, such provisions would not have been thought necessary—or even thought of at all.

The real meaning of the Act is thus to be found in the conduct which organizations and individuals must forego in order to feel some assurance that these penalties will not be applied to them. We submit that the Act's standards are so vague, and their application so necessarily subjective, that no precaution can give entire assurance. However, the best hint as to what prudence requires is that given by Sec. 13(f)(4) (50 U. S. C. Sec. 792 (f)(4)):

> (f) In determining whether any organization is a "Communist-front organization," the Board shall take into consideration * * *.
>
> (4) The extent to which the positions taken or advanced by it from time to time on matters of policy do not deviate from those of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2.

As we pointed out in our opening remarks, and as this record amply demonstrates, the Communist Party takes a position on a vast variety of issues which have no apparent connection with communism, indeed, on virtually every issue which is the subject of current debate. Since an organization cannot know in advance what "extent of non-deviation" will seem significant to the Board, its only safe course is total deviation. The prudent organization, confronted with an issue, must resolve it by finding out what the Communist Party position is and then endorsing its opposite, whether or not that opposite seems to have any intrinsic merit.

Even this may not be quite enough. The Communist Party line is subject to sudden and drastic changes—or, at least, so we have often been told. The Board, in applying

the similar non-deviation test of Section 13(e)(2) (50 U. S. C. Sec. 792(e)(2)), found that parallel statements by Russian and American Communists were equally significant to show domination of the former by the latter, regardless of which came first in point of time. It seems, therefore, that even after the prudent organization has established with reasonable certainty that a proposed policy is not now the Communist position, it still may not be a safe policy to espouse—the Communists might endorse it later.

What this boils down to, as a practical matter, is that the prudent organization will take no position on any controversial issue which might offend the powerful, and the prudent individual will neither join nor contribute to an organization which has ever taken such a position or which might conceivably do so in the future. Thus the Act, as Professor Chafee has pointed out, interferes "by law with freedom of discussion through organizations" and "proposes to twist out of all recognizable shape one of the leading traditions of American life: the possibility of freely forming associations for all sorts of purposes—religious, political, social, and economic." 63 Harv. L. Rev. 1382, 1384; THE BLESSINGS OF LIBERTY (1956) p. 150.

Yet it has frequently been pointed out by commentators on the operation of the American political system that our democracy has functioned through and been vitalized by voluntary association. As Professor Henry Steele Commager of Columbia University put it: "Most of our major reforms, political, social, moral were carried through by voluntary political associations * * *—Once the notion that joining may be dangerous is firmly established, all our organizations will be affected, and the American democracy will dry up at the roots." New York Times Magazine, November 8, 1953.

And this Court has recognized that "freedom to engage in association for the advancement of beliefs and ideas is

an inseparable aspect" of liberty, that the fact that government "has taken no direct action" to restrict it does not end the inquiry, *National Ass'n for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449, 460, 461, and that this freedom is protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates* v. *Little Rock*, 361 U. S. 516.

We realize that it may be argued that some of these questions are premature in the present proceeding, since the petitioner in this case, the Communist Party, is not charged with being a "Communist-front," nor does it, we assume, deny that it is in some sense of the term a "Communist organization," as its name asserts that it is. We submit, however, that the Act's validity must be decided in the light of its total impact on American freedom. That total impact is not limited by the details of this, or any particular, proceeding. *Thornhill* v. *Alabama*, 310 U. S. 88, 97. It is defined rather by the scope of the potential danger arising from the Act which an organization must assess before espousing any policy and which an individual must assess before venturing to join, remain a member of, or contribute to, an organization. This total impact can be determined only by examining the pattern of the Act as a whole.

Such an examination is also appropriate in these proceedings for other reasons:

First: **The primary impact of the Act is not on the Communist Party, but on mixed organizations including non-Communist members.**

This fact is evident from the structure of the Act itself. The Board is created and staffed as a permanent organization; yet it can try the Communist Party only once and then devote the rest of its existence to other organizations. It is plain, also, that the trial of the Communist Party can only come first. The definitions of the Act are such, Secs.

3(4) and 3(4A) (50 U. S. C. Secs. 782(4), 782(4A)), that no organization can well be accused of being a "front" or of being "infiltrated," unless the Communist Party has first been tried and condemned. In practice, the Attorney General has so construed them by deferring his first group of front petitions until a few days after the Board issued its original registration order in the present case.

It is also evident from the Act's setting, both legal and practical. If the findings of Sec. 2 (50 U. S. C. Sec. 781) are assumed to be correct, no new legislation was necessary to impose registration requirements on the Communist Party —it was already subject to registration requirements under both the Voorhis Act, 18 U. S. C. Sec. 2386, and the McCormack Act, 22 U. S. C. Secs. 611 *et seq.* Furthermore, Congress has rendered the Board's trial of the Communist Party perfunctory in advance by deciding that "*the* Communist organization in the United States," which could only refer to the Communist Party, constitutes "a clear and present danger." Sec. 2(15) (50 U. S. C. Sec. 781(15)) (emphasis added). It has been rendered even more perfunctory in retrospect by Sec. 4 (50 U. S. C. Sec. 843) of the Communist Control Act of 1954, 68 Stat. 775 *et seq.*, which specifically identifies the Communist Party as a Communist-action organization.

All of this taken together makes it very plain that, although the order under review subjects the petitioner and its members to sanctions, its primary function, in law as well as in fact, is to serve as a foundation for charges to be brought against other organizations.

Second: **The primary impact of the Act is on organizations, a substantial number of whose members are neither Communists nor Communist sympathizers.**

Conceivably, the term "Communist-front" might be applied to an organization made up entirely of Communists, but which does not proclaim that to be the fact. The Act

makes it evident that this is not what Congress had in mind. Section 13(f) (50 U. S. C. Sec. 792(f)) does not require or provide for proof that a majority, or even a substantial minority, of the members are Communists. The findings in Sec. 2(7) (50 U. S. C. Sec. 781(7)) speak of "fronts" as being "created and maintained, or used, in such manner as to conceal the facts as to their true character and purposes and their membership," and asserts that they are able to obtain "support from persons who would not extend such support if they knew the true purposes * * *." It is evident that what Congress is concerned about here is that organizations asserted to be under Communist influence are able to attract and to retain as members a substantial number of persons who are neither Communists nor Communist sympathizers. In the case of "Communist-infiltrated" organizations, the very name implies that the membership is chiefly non-Communist.

Third: **The primary impact of the Act on a mixed organization is not on the Communist members, but on the non-Communist members.**

This fact, we think, is plainly evident. The citation of a mixed organization before the Board can mean little or nothing to the Communist members, as individuals. It threatens them with no penalty to which they are not already subject. By contrast, its impact on the non-Communist members is enormous. It threatens them with being transformed, at a single stroke, from first class citizens into persons classed inferentially as spies by their automatic ineligibility for a passport, and as saboteurs by their blanket proscription from government, labor union, or defense industry employment.

Professor Chafee has pointed out:

> Even if an enterprise is able to survive, it will have lost most of its moderate members and be wholly in

the hands of extremists who don't care. Its unobjectionable activities will be crippled. Whatever it still does will be more radical than ever. THE BLESSINGS OF LIBERTY (1956) p. 150.

Fourth: **The inhibitory effect of the Act on freedom of expression operates primarily not on insurrectionary ideas, but on non-insurrectionary ideas.**

This, we think, is also very plain. When this Act was passed, the expression of insurrectionary ideas was already fully and exhaustively dealt with in the Smith Act, 18 U. S. C. Sec. 2385, and by the concept of conspiracy to violate the Smith Act. *Dennis* v. *United States*, 341 U. S. 494. Obviously, therefore, it represents a Congressional judgment that activities which the Smith Act failed to reach should also be brought under control. This could only be the expression of ideas condemned not because of their insurrectionary nature, which would bring them within the purview of the Smith Act, but simply because they have Communist support.

Summary of Point I

Taking all these factors into consideration, we think it very evident that the validity of the Act should be determined in this proceeding, not merely by its impact on the petitioner, but mainly by its impact on American civil liberties. *Thornhill* v. *Alabama*, 310 U. S. 88, 97; *Lovell* v. *Griffin*, 303 U. S. 444, 451, 453. If the Act fails for this reason, then it becomes immaterial whether Congress could validly have reached some activities of petitioner under a more narrowly drawn statute. *Reese* v. *United States*, 92 U. S. 214; *James* v. *Bowman*, 190 U. S. 127; *Winters* v. *New York*, 333 U. S. 507.

Taking the impact of the Act as a whole, it is clear that its vagueness and breadth make it invalid by bringing within the scope of its repressive effect much constitution-

ally protected conduct. *Stromberg* v. *California*, 283 U. S. 359; *Herndon* v. *Lowry*, 301 U. S. 242; *Winters* v. *New York*, 333 U. S. 507.

It is a statute in which vague and fluid words set a trap for the innocent. *United States* v. *Cardiff*, 344 U. S. 174, 176-7. It exacts "obedience to a rule or standard * * * so vague and indefinite as really to be no standard at all." *Small* v. *American Sugar Refining Co.*, 267 U. S. 233, 239. It is a prime example of the type of statute concerning which it has been well said that:

> Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense. *Winters* v. *New York*, 333 U. S. 507, 540 (FRANKFURTER, J. dissenting).

It acts as an overhanging threat to, and therefore as a prior restraint on, the free dissemination of ideas, *Thornhill* v. *Alabama*, 310 U. S. 88, 101-102; *Follett* v. *McCormack*, 321 U. S. 573, 575; *Cantwell* v. *Connecticut*, 310 U. S. 296, 306; *Talley* v. *California*, 362 U. S. 60, as well as the freedom to engage in association for the advancement of beliefs and ideas. *National Ass'n for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516. Such previous restraint is to be especially condemned as a form of infringement upon freedom of expression. *Near* v. *Minnesota*, 283 U. S. 697; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 503. And it can no more be reconciled with our national constitutional standard of freedom of speech and press when done in the guise of something else, than when attempted directly. *Konigsberg* v. *State Bar of California*, 353 U. S. 252, 269.

The Act authorizes a Board of five men to sit in judgment on organizations, to determine that some are deserving and others are not, to permit deserving organizations

free access to the market place of ideas, to deny access, except at the price of crippling restraints, to those deemed non-deserving. It is thus, in substance although not in form, a statute which provides for the licensing of expressions of opinion and which confers broad discretion on the licensing authority. Such statutes are invalid on their face. *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Largent* v. *Texas*, 318 U. S. 418; *Niemotko* v. *Maryland*, 340 U. S. 268; *Kunz* v. *New York*, 340 U. S. 290; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495; *Staub* v. *Baxley*, 355 U. S. 313.

II

The Act is unconstitutional because it rests on findings which are beyond congressional power.

A. It is beyond congressional power to declare that the dissemination of non-dangerous ideas should be repressed because the disseminators are connected with a dangerous movement.

Congress, understandably dubious of its power to enact the statute, has attempted to bolster that power by reciting that: "The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger * * *."

Congress, we submit, has no such authority. The existence of a clear and present danger which would, under the decisions of this Court, justify an abridgment of freedom of expression has been recently ruled to be a question of law, to be decided by a court. *Dennis* v. *United States*, 341 U. S. 494. Congress, of course, can make law within the limits of its legislative authority. It cannot decide questions of law, arising out of particular facts, in such a way as to make its decision binding on a court.

Furthermore, Congress cannot lift itself by its own boot straps; it cannot legislate its own powers. Consequently, when the constitutional validity of a statute abridging personal and political freedoms depends on a finding, it necessarily follows that that finding, whether of fact or law, cannot be made by the Congress. *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 638, 640; *Thomas* v. *Collins*, 323 U. S. 516, 529-30; *Thornhill* v. *Alabama*, 310 U. S. 88, 96; *Herndon* v. *Lowry*, 301 U. S. 242, 258.

The opposite result would virtually destroy our device of a written constitution and substitute legislative supremacy. If Congress can render an invalid statute valid by reciting that it finds the facts to be such as would render it necessary, then nullification of First Amendment guarantees, and of any or all constitutional guarantees, is no more than a drafting problem.

If Congress can do what it has done here, it could also "investigate" the "Protocols of Zion," draft an appropriate set of findings, and proceed to restore all the civil disabilities to which Jews were once subject. See Wormuth, *Legislative Qualifications as Bills of Attainder*, 4 Vanderbilt Law Rev. 603, 616. As a matter of fact, in an atmosphere of anti-Semitic excitement, comparable to the atmosphere of anti-Communist excitement which prevailed in 1950 when this Act was passed, it is easily conceivable that such findings might be rendered. It is also easily conceivable that they might be supported by substantial evidence in the investigative record, since in such an atmosphere there would always be witnesses willing, for self-interest or even for a flattering spotlight, to cater to and inflame the current passion.

The position of the Court below that these findings deal with a matter within the general scope of Congressional power, and are conclusive when rendered after "extensive investigation," 223 F. 2d 531, 565, is untenable for several other reasons.

The findings involved here deal principally with the nature and historic significance of the "world Communist movement," with the nature of the governments of foreign countries in which that movement has come to power, and with the intentions of those governments toward the governments of non-Communist countries including our own. The conclusion is that we cannot co-exist with those of our own citizens who are Communists, yet this conclusion is little more than an inference derived from the almost explicit assumption that we cannot co-exist with "the Communist dictatorship of a foreign country," in which "the direction and control of the world Communist movement is vested * * *" These findings have their roots in judgments in the field of international relations. This is a field which the Constitution entrusts almost entirely to the executive branch of the government. Yet the executive branch did not concur that this legislation was needed (see veto message of President Truman). Nor does it, evidently, now concur with the assumptions about international relations on which the findings are based. On the contrary, the executive branch, for at least the last five years, has adopted the position that co-existence with the Communist world is possible and desirable, and that it is being sought.

The findings deal with complex and emotionally charged relationships between people and between institutions and movements composed of people, and with the attitudes and intentions of the people who compose them. If an evaluation and interpretation of such matters can be said to be a "fact" at all, it is at most a very relative, conditional and unstable "fact." With respect to events and conditions subsequent to its enactment, it "can be no more than prophecy, and is liable to be controlled by events." *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, 547. In the ten years since the Act was passed, there have been profound and far-reaching changes in this whole area and the assumption that further changes will take place is far more reasonable

than its opposite. For this reason alone, the position of the Court of Appeals that the fundamental rights of the American people for the present and the indefinite future must be subordinated to the fears expressed by Congress in 1950 is unreasonable, if not wholly irrational.

The finding, in any case, is not a constitutional clear and present danger finding. The constitutional test has always been whether *the particular statements which are being suppressed* give rise to a clear and present danger of substantive evils which Congress has a right to prevent. *Schenck* v. *United States*, 249 U. S. 47. *It is a vastly and fundamentally different thing to say that expressions of opinion which have no inherent tendency to bring about any evil can be suppressed because of the dangerous character of the speaker, or even because of the speaker's affiliation with a dangerous movement.* Despite the use of the phrase "clear and present danger," this goes back to, and even beyond, the old "bad tendency" test. Even the discredited "bad tendency" test at least purported to find the tendency in the speech, not in the speaker's political dossier.

It is not the law that the peaceful advocacy of lawful change can be suppressed or penalized because of the participation, influence or sponsorship of revolutionists. *De Jonge* v. *Oregon*, 299 U. S. 353.

B. It is beyond congressional power to find that a specified group, association or movement, whether identified by name or by description, is engaging in proscribed activity.

The findings included in Section 2 include a "purpose" to use treachery, deceit, infiltration, espionage, sabotage and terrorism. Subdiv. (1). The Board purports, in this proceeding, to have conducted an impartial trial of the question whether American Communists are foreign agents, yet the trial is held under an Act in which Congress instructs the Board at considerable length about the relations between

American Communists and the world Communist movement. Subdivs. 4, 5, 6, 8, 9, 12. It is found in subdiv. (6) that American Communists are endeavoring to overthrow the government by force and in subdiv. (9) that they have repudiated their allegiance to this country. In subdiv. (11) Congress reveals that Communists are engaged in committing espionage and sabotage so cleverly that the government is unable to prove it.

These are findings of guilt and, to a considerable extent, of criminal guilt. They amount to verdicts, rendered against each and every member of the Communist Party, finding them each guilty of a considerable variety of serious felonies, including Smith Act violations and conspiracies to incite rebellion or insurrection, to overthrow the government by force, to commit espionage, to commit sabotage. They are also, in effect, findings that the leaders of the Communist Party are criminally liable for failure to register it under the Voorhis and McCormack Acts, *supra*, although the government has had ample opportunity to indict them on such a charge and has never seen fit to do so.

The power to render findings of personal guilt is one so delicate, so easily subject to abuse, that the framers of our Bill of Rights devised for it a whole interlocking system of limitations and safeguards. Among these are the sifting of accusations by grand juries in order to protect the accused from the injury of unsubstantiated charges, the right to know the nature and cause of the accusation, to confront and cross-examine adverse witnesses, to subpoena and present defense witnesses, to be tried by jury, to be heard by counsel in his own defense before the verdict is rendered. All these laboriously constructed safeguards are automatically swept aside when Congress conducts the trial and renders the verdict in the form of "findings" attached to an enactment.

We think that the basic reasons why bills of attainder are constitutionally prohibited is that the legislative process does not permit of adequate guarantees that such questions will be decided justly. We also think that Section 2 of the Act is in substance a gigantic bill of attainder in which thousands of individuals have been simultaneously adjudged guilty of serious offenses. *United States* v. *Lovett*, 328 U. S. 303; *Cummings* v. *Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333.

The fact that the verdict is rendered against all members of a group, instead of against named individuals, does not render the finding more legislative in character. *Rather, it shows that Congress has undertaken to convict not only those individuals against whom it has heard evidence, but also many thousands of others concerning whom, as individuals, no evidence whatsoever was produced. This merely complicates the abuses which the framers of the Constitution feared in legislative trials by adding to them a still further abuse.*

The purely verbal trick of substituting "the Communist movement in the United States" and "the Communist organization in the United States" for the name "Communist Party of the United States," is a disguise so paper-thin that it would be unworthy of comment but for the fact that it shows Congress' awareness that it was attempting, in Section 2, something which would be held unconstitutional if done too openly. It is otherwise without significance. The great constitutional guarantees deal with substance, not form.

It is true that, if we are right in our view that there is a fundamental constitutional principle that questions of guilt must be decided by the judicial process, then this Court's decision in *American Communications Association* v. *Douds*, 339 U. S. 382, must be regarded as a departure from that principle. Yet even that case, which we think the Court

will ultimately find it necessary to reconsider, is very far from providing any precedent for the upholding of the present Act. On the contrary, that case is specifically limited to situations where the penal effect on the individuals involved is slight, the number of individuals affected is small, and all of them are regarded as occupying strategic positions from which they can effect the flow of commerce. It was only because of those limitations that the Act there under consideration was upheld. In this case, as we have attempted to demonstrate under Point I, the penal effect is extremely severe, the number of individuals affected is enormous, and they are affected despite the fact that they may occupy positions of very minor importance, or none at all. Also, Section 2 of this Act undertakes to find its myriad defendants guilty of much more serious offenses than a tendency to indulge in political strikes. Even the *Douds* case, far from justifying the present Act, contains many indications by way of dicta that what has been here attempted would be invalid.

C. It is beyond congressional power to evaluate political movements, pronounce them safe or dangerous, or to decide the relative merits of alternative forms of government.

With its findings of guilt Section 2 mingles political interpretations and evaluations. It deals with the "purpose" and "nature" of the Communist movement. It pronounces on the desirability of Communism as a system of government. Subdivs. (2) and (3). It pronounces Communism as a political movement or tendency to be a dangerous aberration, which the government, subdiv. (15), must undertake to frustrate. It rules that Communist organizations, although they may "designate themselves as political parties," are "in fact" not political parties. Subdiv. (6).

Even those who wholeheartedly agree with all the political judgments embodied in Section 2 should recognize that

a body competent to reach them, *not as personal opinions but with official finality*, must necessarily be equally competent to determine, if it should ever be so inclined, that the Democratic Party should be suppressed because it is "in fact" a plot to bankrupt the country and disrupt the national economy, or the Republican Party because it is "in fact" nothing but a subservient tool of private corporate greed.

We submit that the First Amendment was adopted precisely to prevent governmental findings on such questions. Indeed, in the field of political liberty, the First Amendment could serve no other practical purpose. No constitutional limitations are needed to prevent governments from suppressing views which those in power *do not* consider dangerous and unwholesome.

It is not the function of the Congress to decide whether a form of government is good or bad, whether a political movement is a danger or a promise, whether a political theory is true or false. It is not its function to decide that persons who "designate themselves as political parties" should be denied the right to offer, endorse and oppose candidates, publish political platforms, support and oppose legislation, etc., because Congress disbelieves their political representations.

These are not questions of fact but questions of political evaluation. Their decision is an exercise, not of the delegated powers committed to a representative government, but of the ultimate powers reserved to a self-governing people. The power of determining such questions is withheld from the Congress by the First Amendment and reserved to the people by the Ninth and Tenth.

D. The findings are not severable.

The opinions which Congress has expressed in Section 2 constitute the foundation on which the Act's whole structure

is erected. The definitions in Section 3 of "Communist-action," "Communist-front," and "Communist-infiltrated" organizations are expresed in terms of the findings. Without the definitions and the findings on which they rest, the remainder of the "Subversive Activities Control Act of 1950," as amended, has nothing on which to operate.

Hence, in this instance, despite the presence of a severability clause, the fact that the findings are beyond Congressional power necessarily invalidates the Act as a whole.

III

The Act is unconstitutional because it authorizes ideological trials and penalizes beliefs, opinions and attitudes, not evidenced by overt acts.

A. The Act authorizes ideological trials.

The danger of any insurrectionary activity, we learn from Section 2 (15), is dependent on certain conditions precedent. There must first arise "a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement * * *." These, obviously, are remote and entirely hypothetical circumstances, which may never arise at all. Yet without them, not even an unsuccessful insurrectionary attempt is predicted. For the present and the predictable future, "the Communist movement * * * seeks converts * * * by * * * schooling and indoctrination."

It is also interesting to note that Congress has not thought it necessary to require that condemned organizations report on whether they possess arms, ammunition or explosives, nor even on their resources in the way of short-wave apparatus, cloaks, daggers and supplies of invisible ink. It has, however, required:

> "A listing, in such form and detail as the Attorney General shall by regulation prescribe, of all printing presses and machines including but not limited to rotary presses, flatbed cylinder presses, platen presses, lithographs, offsets, photo-offsets, mimeograph machines, multigraph machines, duplicating machines, ditto machines, linotype machines, intertype machines, monotype machines, and all other types of printing presses, typesetting machines or any mechanical devices used or intended to be used, or capable of being used to produce or publish printed matter or material, which are in the possession, custody, ownership, or control of the Communist-action or Communist-front organization or its officers, members, affiliates, associates, group, or groups in which the Communist-action or Communist-front organization, its officers or members have an interest." Sec. 7 (d) (6).

This section, although not part of the original Act but added by a later amendment, may be said to speak for itself as a Congressional construction of the nature of the "clear and present danger."

The Act's instructions to the Board as to the matters it shall "take into consideration" set the stage for an ideological trial by their heavy stress on parallelism in views and policies and on the subjective state of mind to be attributed to members or leaders of the accused organizations. This stress is matched by the Act's complete failure to require proof of any objective facts adequate to the determination of issues to which grave legal consequences have been attached.

Space does not permit a detailed analysis of the Board's voluminous report, yet we nevertheless submit that a close and critical analysis of that document, in particular its processes of inference, will make it clear that the abuses which the Act so obviously invites have in fact occurred.

A glance at either the original or the modified report is sufficient to make clear that references to historical works on Communist theory written by Europeans since deceased are enormously more numerous, and have much greater bearing on the Board's conclusions, than references to overt conduct found to have been engaged in by petitioner. By this method of reasoning, the Board would be competent, if it should ever be so inclined, to proscribe the Democratic Party on the basis that Jefferson and Madison advocated revolution under certain conditions, or the Republican Party on the basis of similar statements of Lincoln and Grant. See footnote to opinion of Justice JACKSON in *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 440. On closer examination of the reasoning process, it becomes evident that the Board has not looked to petitioner's conduct as a test of what it really believes. On the contrary, it has started by attributing its own version of the theory to petitioner and then used this as a basis for inferring the significance and motivation of petitioner's conduct. Compare *Schneiderman* v. *United States*, 320 U. S. 118, 158-9. For example, when it wishes to know whether the Communist Party, despite its denials, intends to undertake violent revolution in the United States, the Board does not look to see whether the matter can be tested objectively, for example by inquiring whether overt preparations for such an undertaking, such as military drills and the accumulation of secret arms caches, have taken place. Instead, it looks to see what Lenin said about it.

The following example is representative:

> Equally basic with the international and revolutionary character of Marxism-Leninism is the tenet of the dictatorship of the proletariat. *In view of the divergence of testimony* of witnesses for petitioner and those of respondent concerning the meaning and application of this tenet, we have taken pains to *ascertain its real character*. (Modified Report, p. 19) (emphasis added).

It is assumed without discussion that the Communist Party's beliefs must correspond to the "real character" of this "tenet," whether or not it has ever expressed that version, much less acted on it. And the "real character" of the "tenet" is "ascertained" by a parade of quotations from the works of Lenin and Stalin.

In short, the Board has not tried the Communist Party. It has tried and condemned "Marxism-Leninism."

In the original report, this process reached its grotesque climax in findings that "Marxism-Leninism * * * has been promulgated and issued by the Soviet Union as the overall philosophy, authoritative rules, directives and instructions governing the world Communist movement" (p. 78) and that "the Marxist-Leninist classics are one of the chief means by which the Communist Party of the Soviet Union directs, dominates and controls the Communist Party of the United States" (p. 43). Thus, according to the Board's theory, if an American reads the "Communist Manifesto," a work written in England by German refugees more than half a century before the Russian revolution, and if he finds it convincing and adopts its ideas as his own, he thereby becomes *ipso facto* a Russian agent and falls under the sway of Russian Communist leaders who are "controlling and dominating" him through the medium of the book. This is witch-hunting at its weirdest.

In the modified report, this theory is not quite so frankly stated, but it is still present (for example, pp. 9-10) and still dominates the whole process of inference. And the Board expressly concludes: "It would seem clear that, the world Communist movement being Marxism-Leninism in action, there could be no substantive break with the movement without a substantial departure from or revision of Marxism-Leninism by respondent" (p. 204). In other words, not only is the Communist Party subject to the penalties of the Act, but nothing it could do or say, or refrain

from doing or saying, would change the matter, as long as it does not "substantially depart from or revise" its theory. And therefore, in substance, it is the theory itself, not words expressing it or conduct inspired by it, against which the penalties of the Act are being invoked.

B. The Act penalizes beliefs.

Under Point I we have discussed the sanctions of the Act, and what is said there need not be repeated. At this point, we wish merely to take note that some, at least, of these sanctions permit of only two interpretations. Either they are penalties imposed for the mere holding of a belief or they are conclusive presumptions, drawn from the mere fact of belief, that the individual involved is disposed to commit offenses which he is not shown ever to have committed.

For example, the Act subjects any member of an organization ordered to register to a penalty of $10,000 fine and five years imprisonment, Sec. 15 (c), for the offense of applying for, using or attempting to use a passport, Sec. 6(a). No showing is required that the passport was used or intended for any improper purpose. Unless the intention is purely punitive, it must embody an implied Congressional judgment that *all* members of the Communist Party and *all* members of *all* "Communist-front" organizations are unfit to be trusted with passports. The Act contains nothing to explain or illuminate such a judgment, except the statement in Section 2(8) that "travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement."

Yet the Act does not require a scintilla of proof that the individual denied a passport has ever served as an international courier or evinced any willingness to do so. It

makes no provision for the consideration of affirmative proof as to why he needs to go abroad or what he intends to do. It does not permit the issuing officer to find that any combination of facts whatever outweigh the bare fact of an organizational membership. Indeed, it makes the officer guilty of a crime if he issues the passport with knowledge or "reason to believe" that the applicant is a member. If the right to a passport has in fact been cut off, not to punish the individual, but because of a supposed probability that he will serve as an international courier, then that probability has been conclusively presumed from the individual's supposed beliefs, attitudes and loyalties. Even the latter are inferred from the bare fact of membership and, in the case of a non-Communist member of a "front," from the bare fact of association.

Similarly, the Act conclusively presumes unfitness for government employment without proof of any disloyal act and for labor union employment without proof of any participation in a political strike.

Let us suppose the case of a skilled worker who has been in a defense industry for twenty years and for all that time has been a trusted and satisfactory employee. No job he worked on has ever been sabotaged. Now it develops that he must be banned from his present job, and from all defense industry, because of membership in an organization. Is this because he might commit sabotage? If so, why is the line of reasoning from his membership to his beliefs to his probable future conduct—an inference on an inference, winding up with a prediction—so compelling that his contrary record on the specific issue cannot even be taken into consideration?

The pretense that we are not punishing the heretic for his opinions, but are only guarding against the misconduct which his opinions might lead him to commit, is the most ancient and threadbare rationalization of persecution. It

is the very hallmark of bigotry. It was used for centuries by Catholics to justify the imposition of disabilities on Protestants. Protestants, when they came to power, imposed similar disabilities on Catholics and offered the same excuse. Both used it to defend and explain discrimination against the Jews. Why should such a hoary pretext for intolerance rise to haunt the United States in mid-Twentieth Century?

Lord Macaulay wrote more than a century ago:

> "It is altogether impossible to reason from the opinions which a man professes to his feelings and his actions; and in fact no person is ever such a fool as to reason thus, except when he wants a pretext for persecuting his neighbors" (Historical Essays, London, 1932, p. 92).

> "If such arguments are to pass current, it will be easy to prove that there was never such a thing as religious persecution since the creation. For there never was a religious persecution in which some odious crime was not, justly or unjustly, said to be obviously deducible from the doctrines of the persecuted party * * *.

> "*The true distinction is perfectly obvious. To punish a man because he has committed a crime, or because he is believed, though unjustly, to have committed a crime, is not persecution. To punish a man, because we infer from the nature of some doctrine which he holds, or from the conduct of other persons who hold the same doctrines with him, that he will commit a crime, is persecution, and is, in every case, wicked and foolish*" (Ibid, pp. 7-8). (Emphasis supplied.)

IV

The Act is not justified by any special danger or emergency.

A. The First Amendment expresses the view that freedom, not repression, is the only road to true security.

The theory has recently become so popular that it is often treated as almost axiomatic, that freedom and security are competing values, and that problems under the First Amendment must therefore take the form of determining how much freedom it is necessary to sacrifice in order to attain "security."

We submit that, had this been the idea which the framers of the First Amendment desired to express, they might have written that the freedoms mentioned should not be "unduly" or "unnecessarily" abridged. They could not possibly have arrived at the formulation which they in fact used.

The framers undoubtedly believed that there were ways of speaking (such as obscenity) and uses of speech (such as fraud, libel, or counseling to crime) which were not part of "the freedom of speech" and therefore could be controlled without "abridging" that freedom. It does not follow that they supposed that a belief on the part of those in authority that a dangerous situation existed could ever justify throwing governmental force on one side or the other of public debate, restraining one point of view as to what the public interest requires, while permitting its opposite to be freely expressed.

On the contrary, they must have known that, only when those in authority feel that freedom of discussion should be sacrificed to "security" or some other "competing value," could there be any need to reinforce that freedom by means of a consitutional guarantee. No government ever has, or ever would, abridge it under any other circumstances.

The currently fashionable view requires two assumptions (usually inexplicit): (1) that security can be obtained by means of repression; and (2) that it cannot be obtained otherwise.

We submit that the verdict of history is to the contrary. Is it mere coincidence that Communists rule today in Russia (which, in the times of the Tsars, was a very model of "internal security," as that phrase has recently been used), but not in England (which has permitted Communists to teach and organize without interference for more than a century)? Is not the lesson of history that governments which have sought to make themselves secure through repression have found, not security, but a rigidity and blindness, an inability to grow and change and adapt, which only made their ultimate downfall the more bloody, and the more inevitable? Have not governments which dared to stake their existence on the continued confidence and support of a free people proved, in the long run, to be strengthened, not weakened, by that course?

We think this is the insight which underlies the First Amendment. We think that Amendment was designed to force our government to seek its security through freedom, by forbidding it to seek it in any other way.

This was the view expressed by Jefferson when he said, in his First Inaugural, "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it," and went on to express his faith that such a course would not make the government weak, but would make it "the strongest government on earth."

This was the view expressed by Mr. Justice BRANDEIS in a great concurring opinion:

> Those who won our independence * * * knew that order cannot be secured merely through fear of punishment for its infraction; that *it is hazardous to discourage thought*, hope and imagination; that repression breeds hate; that hate menaces stable government; that *the path of safety lies in the opportunity to discuss freely* supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. *Whitney* v. *California*, 274 U. S. 357, 375-6 (concurring opinion) (emphasis added).

This is the view which, not so many years ago, was expressed by this Court, in an eloquent opinion by Chief Justice HUGHES, from which no Justice dissented:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, *the more imperative is the need to preserve inviolate* the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. *Therein lies the security of the Republic*, the very foundation of constitutional government. *DeJonge* v. *Oregon*, 299 U. S. 353, 365 (emphasis added).

B. Even on the assumption that the First Amendment is subject to exceptions or contractions to meet special situations, the present statute cannot be justified on such grounds.

At least where First Amendment freedoms are at stake, it is not constitutionally permissible "to burn the house to roast the pig." *Butler* v. *Michigan*, 352 U. S. 380, 383. Legislation which impinges on such rights must be "reasonably restricted to the evil with which it is said to deal"

Ibid. It must be "narrowly drawn to prevent the supposed evil." *Cantwell* v. *Connecticut*, 310 U. S. 296, 307, 311. Legislative intervention to protect the people against abuses of First Amendment rights "can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." *DeJonge* v. *Oregon*, 299 U. S. 353, 364-5. In restraining unlawful advocacy, government "must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights." *Speiser* v. *Randall*, 357 U. S. 513, 521. And even the power to regulate action "must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell* v. *Connecticut*, 310 U. S. 296, 304. Legal devices and doctrines which are, in most applications, consistent with the Constitution, "cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." *Smith* v. *California*, 361 U. S. 147, 80 S. Ct. 215, 217.

It follows that, if emergency can create power to abridge freedom of speech and association, it can create at most a power to use temporary measures of an emergency nature. It "is an essential safeguard of freedom that emergency measures ought to be carefully confined to the emergency and not operate as everyday laws." Chafee, THE BLESSINGS OF LIBERTY (1956) p. 135. And this Court has recognized and enforced that principle, even when far less essential rights were being far less drastically curtailed. *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543.

But Title I of the Internal Security Act of 1950 is not temporary legislation. Nor is it, like Title II, limited to operate only in emergencies. It creates a permanent institution to supervise, in perpetuity, the political purity of voluntary associations. If approved by this Court, it would freeze our rights of discussion and association at a level much lower than we have customarily enjoyed—perhaps the

lowest level in our history. Such a change cannot be constitutionally justified by a plea of emergency, if only because it goes far beyond anything which an emergency might make necessary.

For similar reasons, it cannot be justified by reference to the "clear and present danger" doctrine. There is no such thing as a permanent "clear and present danger." If there were, it could not be established by the findings of a Congress not endowed with the gift of prophecy. But, even if there were and it could be so established, this still would not save the present Act, since it does not limit itself, or even attempt to limit itself, to evils which Congress has a right to prevent. Instead it represses the processes by which a democratic public opinion is formed, at their very source, without regard to whether anything unlawful has been advocated or is likely to occur.

This Act expresses a state of mind which was a product of a very unique moment in our history. It was enacted in September, 1950, when the Korean War was three months old and still going badly. Hatred and fear of Communism was so intense as to make rational thinking on the subject difficult, and realism and objectivity impossible.

In the ten years intervening, we have had no registrations under this Act—and we have been in no way embarrassed or imperiled by the lack of them. That, in itself, should be a sufficient demonstration that, if any genuine emergency or "clear and present danger" requiring these measures existed in September, 1950, it quickly passed away without the application of the remedy which Congress deemed necessary.

Much else has happened during those ten years. The world Communist movement has been shaken to its foundations by the death of Stalin, the Khrushchev report on Stalin's crimes, and the events in Hungary. The Communist Party in this country has been virtually decimated

in its membership (which was never large) and much weakened in its influence. A trend toward greater individual freedom and greater security for the individual against arbitrary governmental action has set in in the U.S.S.R. The assumption that coexistence between the U.S.A. and the U.S.S.R. is impossible, so easily made in 1950, has given way to official recognition by both governments that such coexistence is necessary to spare the world the horrors of an atomic war and that, despite all difficulties and setbacks, some way to attain it can and must be found. It is much easier today than it was in 1950 to see that our government is competing with the U.S.S.R. for the sympathy of the uncommitted third of the world and that, in that competition, our reputation for genuine commitment to freedom is an asset which we cannot afford to fritter away for the sake of compiling political dossiers and blacklists on our own citizens.

In that ten years we have lived through the national fever popularly known as McCarthyism—of which this Act was an early and extreme expression. That unhealthy excitement has, fortunately, largely subsided. And we have learned—or should have learned—that the product of such methods is not security, but fear, conformity, suspicion and paralysis. Yet this Act, if upheld, would not only revive some of the worst features of McCarthyism, but would perpetuate them by erecting them into a permanent institution.

The present danger is not that the American people will be lured into catastrophe because of free and uninhibited discussion of public issues. The present danger is that we will permit the fears and passions of a transitory moment to induce us to do permanent damage to our institutions.

CONCLUSION

We submit that the Subversive Activities Control Act should be held unconstitutional on its face. It follows that the decision below should be reversed.

Respectfully submitted,

ROYAL W. FRANCE,
Attorney for Amici Curiae.

LAURENT B. FRANTZ,
Of Counsel.

APPENDIX A

Names of *Amici Curiae*

Rev. Edwin E. Aiken
Goshen, Massachusetts

Mr. Paul F. Albright
Hollydale, California

Rev. Gross W. Alexander
Lucerne Valley, California

Miss Carolyn E. Allen
Milwaukee, Wisconsin

Prof. Edward S. Allen
Ames, Iowa

Rev. Albert Allinger, D.D.
Cranford, New Jersey

Prof. Gordon W. Allport
Cambridge, Massachusetts

Rev. Paul J. Allured
Lansing, Michigan

Mr. and Mrs. B. S. Alper
Brookline, Massachusetts

Mr. Reuel S. Amdur
Portland, Oregon

George R. Andersen, Esq.
San Francisco, California

Mrs. Bertha Anderson
Minneapolis, Minnesota

Rev. Burns M. Anderson
Santa Barbara, California

Mr. Hugh Anderson
So. Pasadena, California

Miss Robenia F. Anthony
Provincetown, Massachusetts

Prof. Victor Arnantoff
Colma, California

Donald H. Atlas, M.D., Ph.D.
Chicago, Illinois

E. O. Austin, Esq.
Yonkers, New York

Prof. George E. Axtelle
Carbondale, Illinois

Prof. Charles R. Bagley
Oakland, California

Rev. Roland H. Bainton
New Haven, Connecticut

Rev. William T. Baird
Chicago, Illinois

Bishop James C. Baker
San Marino, California

Miss Emily G. Balch
Cambridge, Massachusetts

Rev. Frederic E. Ball
Chicago, Illinois

Rev. Lee H. Ball
Ardsley, New York

Prof. Frances M. Barbour
Carbondale, Illinois

Prof. Adriaan J. Barnouw
New York, New York

Prof. Stringfellow Barr
Princeton, New Jersey

Edward K. Barsky, M.D.
New York, New York

Rev. Charles A. Barton
Jamaica, New York

Mrs. Charlotta A. Bass
Los Angeles, California

Rev. Harold J. Bass, Ph.D.
Tacoma, Washington

Mr. Richard W. Baum
Elma, New York

Rabbi Morton A. Bauman
No. Hollywood, California

Abraham I. Beacher, M.D.
Brooklyn, New York

Mr. Carleton Beals
Deep River, Connecticut

Prof. Irwin R. Beiler
Meadville, Pennsylvania

Rev. Lee A. Belford, Ph.D.
New York, New York

Hon. Elmer A. Benson
Appleton, Minnesota

Dr. C. W. Berenda
Norman, Oklahoma

Miss Hella Bernays
New York, New York

Prof. Saul Bernstein
Boston, Massachusetts

Mr. Marion P. Betty
Los Angeles, California

Prof. Ray A. Billington
Evanston, Illinois

Miss Jessie G. Binford
Chicago, Illinois

Prof. Raymond T. Birge
Berkeley, California

Mr. Algernon D. Black
New York, New York

Prof. C. L. Blackman
Columbus, Ohio

Rev. Ben B. Bland
Portsmouth, Virginia

Miss Catherine Blanton
Tucson, Arizona

Mrs. Anita Block
New York, New York

Prof. Derk Bodde
Philadelphia, Pennsylvania

Rev. Charles W. Bonner
Kearny, New Jersey

Rev. Karel F. Botermans
Flint, Michigan

Prof. Clark H. Bouwman
St. Petersburg, Florida

Rev. Clarence E. Boyer
New York, New York

Miss Kay Boyle
Rowayton, Connecticut

Prof. Charles S. Braden
Dallas, Texas

Prof. G. Murray Branch
Atlanta, Georgia

Mr. Millen Brand
New York, New York

James L. Brewer, Esq.
Rochester, New York

Dr. William M. Brewer
Elberton, Georgia

Dr. Dorothy Brewster
New York, New York

PROF. P. W. BRIDGMAN
Cambridge, Massachusetts

REV. CLINTON E. BROMLEY
Stoughton, Massachusetts

PROF. DAVID K. BRUNER
Stockton, California

MR. FRED BUCH
Los Angeles, California

DR. SCOTT BUCHANAN
Santa Barbara, California

MRS. W. T. BURCH
San Diego, California

PROF. EDWIN BERRY BURGUM
New York, New York

REV. DUDLEY H. BURR
Albion, Michigan

DR. ALLAN M. BUTLER
Vineyard Haven, Massachusetts

REV. J. GEORGE BUTLER
Jacksonville, Vermont

HENRY A. CALLIS, M.D.
Washington, D. C.

MISS LUCY P. CARNER
Philadelphia, Pennsylvania

MR. ROBERT CARSE
Shelter Island, New York

REV. FRANK T. CARTWRIGHT
Maplewood, New Jersey

REV. PAUL W. CATON
Winner, South Dakota

PROF. JOHN CAUGHEY
Pacific Palisades, California

REV. MARK A. CHAMBERLIN
Gresham, Oregon

REV. JOHN S. CHAMBERS
Lexington, Kentucky

MR. EMIL A. CHAMPKE
Portland, Oregon

RUSSELL N. CHASE, ESQ.
Cleveland, Ohio

PROF. SERGE CHERMAYEFF
Cambridge, Massachusetts

REV. LEONARD G. CLOUGH
Hanover, New Hampshire

REV. ALBERT BUCKNER COE
New York, New York

JOHN M. COE, ESQ.
Pensacola, Florida

DEAN NATHAN E. COHEN
Shaker Heights, Ohio

PROF. ROBERT S. COHEN
Watertown, Massachusetts

PROF. CARL W. CONDIT
Morton Grove, Illinois

REV. J. RAYMOND COPE
Berkeley, California

MR. PAUL COREY
Sonoma, California

REV. JOHN W. COUGHLAN
Seattle, Washington

DEAN VERN COUNTRYMAN
Albuquerque, New Mexico

REV. HENRY H. CRANE
Detroit, Michigan

HAROLD A. CRANEFIELD, ESQ.
Detroit, Michigan

GEORGE W. CROCKETT, JR., ESQ.
Detroit, Michigan

Rabbi Abraham Cronbach
Cincinnati, Ohio

Prof. Ephraim Cross
New York, New York

Prof. Winterton C. Curtis
Columbia, Missouri

Rev. Wolcott Cutler
Charlestown, Massachusetts

Rt. Rev. Benjamin D. Dagwell
Portland, Oregon

Mr. John H. Davenport
Levittown, New York

Dr. C. Ernest Davis
San Francisco, California

Rev. Lewis H. Davis
Brooklyn, New York

Percy M. Dawson, M.D.
Los Altos, California

Rev. Gardiner M. Day
Cambridge, Massachusetts

Rev. John W. Day
Asheville, North Carolina

Prof. John J. De Boer
Champaign, Illinois

Mr. Solon De Leon
Long Island City, New York

Dr. William Wells Denton
Tucson, Arizona

Miss Annetta Dieckmann
Chicago, Illinois

Mr. Harry L. Diehl
Gibson City, Illinois

Miss Lois Diehl
New York, New York

Mr. Irving Dilliard
Collinsville, Illinois

Prof. J. Frank Dobie
Austin, Texas

Dr. James A. Dombrowski
New Orleans, Louisiana

Dr. Dorothy Douglas
Gettysburg, Pennsylvania

Mrs. Mary Dreier
Southwest Harbor, Maine

Rev. Edwin T. Duehrer
Chicago, Illinois

Prof. Kermit Eby
Chicago, Illinois

Morton A. Eden, Esq.
Detroit, Michigan

Bertram Edises, Esq.
Oakland, California

Dr. Lewis A. Eldridge, Jr.
Rensselaerville, New York

Rev. Laurence W. C. Emig
Melrose, Massachusetts

Mrs. Virginia W. Epstein
Flushing, New York

Mr. Philip Evergood
Oxford, Connecticut

Mr. Eugene Exman
New York, New York

Rev. William J. Faulkner
Chicago, Illinois

Prof. Robert D. Feild
Cambridge, Massachusetts

Mr. Eugene E. Feldman
Pasadena, California

Dr. Jacob Fine
Boston, Massachusetts

Mrs. Alfred G. Fisk
San Francisco, California

Mr. Michael C. Flaherty
Boston, Massachusetts

Rev. Prof. Joseph Fletcher
Cambridge, Massachusetts

Mrs. Londa S. Fletcher
Palo Alto, California

Rev. Norman D. Fletcher
Montclair, New Jersey

Rev. H. Folkestad
Sarona, Wisconsin

Rev. Kenneth Ripley Forbes
Philadelphia, Pennsylvania

Prof. Charles W. Forman
New Haven, Connecticut

Rev. Hugh B. Fouke, D.D.
Dubuque, Iowa

Dr. G. George Fox
Chicago, Illinois

Lewis M. Fraad, M.D.
New York, New York

Mr. Waldo Frank
Truro, Massachusetts

Miss Elizabeth P. Frazier
Philadelphia, Pennsylvania

Dr. Albert Freeman
Los Angeles, California

Mr. R. Friedman
Portland, Oregon

Dr. Irwin A. Gaede
Los Angeles, California

Dr. H. W. Gardner
Jamaica, New York

Prof. Ira L. Gibbons
Washington, D. C.

Rev. Walter C. Giersbach
Montclair, New Jersey

Rev. John G. Gill
Tacoma, Washington

Mr. Daniel S. Gillmor
New York, New York

Mr. Robert W. Gilmore
New York, New York

Dr. Benjamin Ginzburg
Arlington, Virginia

Judge Alfred Gitelson
Los Angeles, California

Dr. Marcus I. Goldman
Washington, D. C.

Prof. Erwin R. Goodenough
New Haven, Connecticut

Mr. Franc C. Goodrich
Berkeley, California

Prof. William C. Greene
Center Sandwich, New Hampshire

Dr. Ralph H. Gundlach
New York, New York

Mr. Theodore Gurney
Glastonbury, Connecticut

Mr. Carl Haessler
Detroit, Michigan

Dr. Royal G. Hall
De Land, Florida

Miss Margaret Halsey
White Plains, N. Y.

ALICE HAMILTON, M.D.
Hadlyme, Connecticut

DR. BERTA HAMILTON
Newfane, Vermont

MR. STANLEY HAMILTON
Richmond, Indiana

JOHN T. HARDING, PH.D.
South Pasadena, California

REV. PAUL HARRIS, JR.
Acton, Massachusetts

MISS PEARL M. HART
Chicago, Illinois

MRS. DOROTHY HAVEN
Falls Village, Connecticut

PROF. A. EUSTACE HAYDON
Chicago, Illinois

W. FOSTER HAYES, ESQ.
Harvey, Illinois

PROF. WALTER A. HEARN
Columbia, Missouri

PROF. HAROLD HEEREMANS
Leonia, New Jersey

MISS MARIAN E. HERRICK
Los Angeles, California

MISS LILLIAN HERSTEIN
Chicago, Illinois

NATHAN HERZBERG, ESQ.
Los Angeles, California

PROF. WILLIAM F. HEWITT
Des Moines, Iowa

PROF. PHILIP M. HICKS
Avondale, Pennsylvania

RABBI ISIDOR B. HOFFMAN
New York, New York

REV. JOHN HAYNES HOLMES
New York, New York

REV. REYNOLD N. HOOVER
Flagler Beach, Florida

MR. JOHN N. M. HOWELLS
Weston, Massachusetts

REV. DONALD E. HOWITZ
Montgomery, New York

MR. WILLIAM R. HUNTINGTON
St. James, New York

REV. DONALD P. HURLBURT
Westminster, Vermont

REV. WARREN E. JACKSON
Maumee, Ohio

PROF. C. R. JEPPESEN
Missoula, Montana

REV. ARTHUR J. JOHNSON
Whitewater, Wisconsin

BEN JOHNSON, ESQ.
Boston, Massachusetts

PROF. EARL S. JOHNSON
Shorewood, Wisconsin

MR. JOHN L. JOHNSON
Crosby, Minnesota

MR. RUSSELL JOHNSON
Petersham, Massachusetts

REV. DELBERT E. JOLLEY
New Castle, Pennsylvania

REV. ASHTON B. JONES
San Gabriel, California

REV. JOHN PAUL JONES, D.D.
Ashfield, Massachusetts

PROF. LYLE V. JONES
Chapel Hill, North Carolina

Mrs. Margaret C. Joyce
Pasadena, California

Prof. Horace M. Kallen
New York, New York

Gabriel Kantrovitz, Esq.
Boston, Massachusetts

The Rev. K. F. Kauffman
Epping, New Hampshire

Prof. Forrest M. Keen
Tiffin, Ohio

Prof. Edwin C. Kemble
Cambridge, Massachusetts

Robert W. Kenny, Esq.
Los Angeles, California

Mr. Rockwell Kent
Au Sable Forks, New York

Dr. David Kettler
Columbus, Ohio

Prof. Albion Roy King, Ph.D.
Mount Vernon, Iowa

Rev. Thomas M. King
Arthur, Iowa

Mrs. Gertrude E. Klause
Pasadena, California

The Rev. Dana E. Klotzle
Boston, Massachusetts

Mr. Alexander Laing
Hanover, New Hampshire

Mr. Corliss Lamont
New York, New York

Dr. John A. Lapp
Macatawa, Michigan

Mr. Bruno Lasker
Poulsbo, Washington

Rev. John H. Lathrop
Berkeley, California

Dr. Paul H. Lavietes
New Haven, Connecticut

Dr. Charles R. Lawrence
Pomona, New York

Dr. Catherine D. Lealtad
Humacao, Puerto Rico

James E. Lebensohn, M.D.
Chicago, Illinois

Rev. Charles Wesley Lee
Brooklyn, New York

Rev. George C. Lee
Noxon, Montana

Prof. Paul Lehman
Cambridge, Massachusetts

Rev. William Philip Lemon
Ann Arbor, Michigan

Miss Irmgard Lenel
Santa Monica, California

Mrs. Helen Lindgren
West Covina, California

Prof. C. F. Littell
Deposit, New York

Sol Londe, M.D.
St. Louis, Missouri

Rev. W. E. Longstreth
Columbia, Missouri

Prof. Oliver S. Loud
Yellow Springs, Ohio

Mr. Stephen Love
Chicago, Illinois

Rev. Robert E. Luccock
New Haven, Connecticut

Miss Florence H. Luscomb
Cambridge, Massachusetts

Prof. Robert S. Lynd
New York, New York

Rev. Prof. Harvey K. McArthur
Hartford, Connecticut

Dr. Walter A. McBleneghan
Tucson, Arizona

Prof. Henry L. McClintock
Boulder, Colorado

Martin A. McCormack, Esq.
Cleveland, Ohio

Rev. Howard D. McGrath
Chatham, New York

Rev. Warren H. McKenna
Holbrook, Massachusetts

Mr. John T. McManus
Montrose, New York

Rev. Jack Richard McMichael
Pasadena, California

Rev. Prof. John T. McNeill
East Middlebury, Vermont

Prof. Curtiss MacDougall
Evanston, Illinois

Mrs. Helen H. MacMartin
Burlington, Vermont

D. William Maki, Esq.
Detroit, Michigan

Seymour Mandel, Esq.
Los Angeles, California

Hugh R. Manes, Esq.
Hollywood, California

Dr. John M. Marsalka
New Haven, Connecticut

Mr. Lafayette Marsh
La Grange, Illinois

Mr. Raymond L. Marsh
Hayward, California

Rev. Joseph Mason
What Cheer, Iowa

Dr. Kirtley F. Mather
Cambridge, Massachusetts

Henry Mayer, M.D.
Woodside, California

Mr. Milton Mayer
Carmel, California

Rev. John M. Mecartney
River Falls, Wisconsin

Prof. Alexander Meiklejohn
Berkeley, California

Mrs. Mary Jane Melish
Brooklyn, New York

Rev. William Howard Melish
Brooklyn, New York

Dr. Clyde R. Miller
New York, New York

Rt. Rev. Walter Mitchell
Rancho Santa Fe, California

Sen. James O. Monroe
Collinsville, Illinois

Rev. Arthur N. Moore
So. Portland, Maine

Rev. John H. Morgan
Hamilton, Indiana

Prof. Joseph P. Morray
Berkeley, California

Robert Morris, Esq.
Los Angeles, California

Dr. Philip Morrison
Ithaca, New York

Capt. Hugh Mulzac
Jamaica, New York

Mr. Lewis Mumford
Amenia, New York

Mr. George B. Murphy, Jr.
Washington, D. C.

Rev. Jesse L. Murrell
Covington, Kentucky

Mr. Francis M. Myers
Denver, Colorado

Mr. Vernon Nash
Santa Barbara, California

Mr. Scott Nearing
Harborside, Maine

Mr. John Oliver Nelson
New Haven, Connecticut

Walter M. Nelson, Esq.
Detroit, Michigan

Dr. Reinhold Niebuhr
New York, New York

Rev. George Nishimoto
Chicago, Illinois

Miss Berenice Noar
New York, New York

Prof. Victor Obenhaus
Chicago, Illinois

Mr. Harvey O'Connor
Little Compton, Rhode Island

Dr. Ahron Opher
Chicago, Illinois

Rudolph Pacht, Esq.
North Hollywood, California

Rev. George L. Paine
Cambridge, Massachusetts

Prof. Victor Paschkis
New York, New York

Rev. Edward L. Peet
Sacramento, California

Rev. Anthony R. Perrino
Spokane, Washington

Rev. Dryden L. Phelps
Berkeley, California

Mr. Clarence E. Pickett
Philadelphia, Pennsylvania

Raymond Pickett, Esq.
Winthrop, Massachusetts

William T. Pillsbury, Esq.
Long Beach, California

Prof. Arthur Upham Pope
Warren Cornwall Bridge, Connecticut

Prof. Elias Hull Porter
Santa Monica, California

Miss Clara Radoff
Houston, Texas

Anthony Randles, Esq.
Los Angeles, California

Mrs. Walter Rautenstrauch
New York, New York

Miss Julia Raymond
Monrovia, California

Mrs. Marjorie B. Reaume
Santa Barbara, California

Dr. Jesse D. Reber
Harrisburg, Pennsylvania

Mr. Anton Refregier
Woodstock, New York

S. Roy Remar, Esq.
Boston, Massachusetts

Miss Bertha C. Reynolds
Stoughton, Massachusetts

Rev. Robert E. Rhodes
Rensselaer, New York

Rev. Herbert W. Rice
Prattville, Alabama

Mr. M. J. Robinson
Allyn, Washington

Mrs. M. J. Robinson
Allyn, Washington

Prof. Arnold A. Rogow
Stanford, California

Mr. Curtis Roosevelt
New York, New York

Mr. Herbert T. Rosenfeld
Santa Monica, California

Marshall Ross, Esq.
Los Angeles, California

Prof. Harry Ruja
La Mesa, California

Miss Rose V. Russell
New York, New York

Clarence E. Rust, Esq.
Oakland, California

Prof. C. G. Rutenber
Newton Centre, Massachusetts

Thomas Paine Saltiel, M.D.
Chicago, Illinois

Mrs. Agnes G. Sanborn
Cambridge, Massachusetts

Prof. Paul A. Schilpp
Glenview, Illinois

Miss Emma Schmidt
Chicago, Illinois

Prof. Karl Scholz
Media, Pennsylvania

Dr. S. Schulsinger
Newark, New Jersey

Arthur Schutzer, Esq.
New York, New York

Mr. Louis B. Scott
Albany, California

Mr. Robert H. Scott
Grants Pass, Oregon

Dr Herbert Shapiro
Philadelphia, Pennsylvania

Rev. Waitstill H. Sharp
Davenport, Iowa

Dr. D. R. Sharpe
Pasadena, California

Prof. Abraham E. Sharrow
Chicago, Illinois

Rev. Warren P. Sheen
Denville, New Jersey

Mr. Odell Shepard
Waterford, Connecticut

Miss Alice Shoemaker
Glendale, California

Lawrence D. Shubow, Esq.
Boston, Massachusetts

Prof. Mulford Q. Sibley
Minneapolis, Minnesota

Rev. Prof. Walter E. Sikes
Denver, Colorado

Mrs. Margaret T. Simkin
Los Angeles, California

PROF. J. DAVID SINGER
Ann Arbor, Michigan

FRANK J. SLATER, M.D.
Clinton, New York

MRS. FRANK J. SLATER
Clinton, New York

MR. HENRY S. SMITH
Colton, California

REV. JACKSON E. SMITH
Minneapolis, Minnesota

PROF. ROCKWELL C. SMITH
Evanston, Illinois

MR. JOHN SOMERVILLE, PH.D.
New York, New York

REV. HERBERT S. SOUTHGATE
Arlington, Virginia

REV. WALTER B. SPAULDING
Great Falls, Montana

LAURENCE R. SPERBER, ESQ.
Beverly Hills, California

REV. WILLIAM B. SPOFFORD
Tunkhannock, Pennsylvania

DR. E. R. STABLER
Syosset, New York

CHESTER J. STALEY, ESQ.
Los Angeles, California

REV. C. S. STEELE
Cleveland, Ohio

MISS ELIZABETH STERENBERG
Chicago, Illinois

HERMAN STERN, ESQ.
Los Angeles, California

MR. I. F. STONE
Washington, D. C.

MAURICE SUGAR, ESQ.
Detroit, Michigan

DR. ARTHUR L. SWIFT
Rhinebeck, New York

PROF. ELLEN B. TALBOT
Spartanburg, South Carolina

REV. ERIC M. TASMAN
South Orange, New Jersey

MR. HOWARD G. TAYLOR, JR.
Riverton, New Jersey

MRS. PAULINE TAYLOR
Youngstown, Ohio

MR. WILLIAM PALMER TAYLOR
Hamilton, Ohio

REV. JOHN B. THOMPSON
Berkeley, California

J. B. TIETZ
Los Angeles, California

ANTHONY TONEY, ESQ.
Katonah, New York

REV. ERNEST J. TROUTNER
Palo Alto, California

SIDNEY R. TROXELL, ESQ.
Los Angeles, California

DR. CHAS. J. TURCK
New York, New York

GRETCHEN TUTHILL
Pasadena, California

MRS. ELSIE H. TYNDALE
Minneapolis, Minnesota

MRS. LEWIS TYREE
Lexington, Virginia

MR. LOUIS UNTERMEYER
Newton, Connecticut

PROF. HAROLD C. UREY
La Jolla, California

PROF. ROY L. VAN DEMAN
Los Angeles, California

MISS OLIVE O. VAN HORN
New York, New York

DR. MARY VAN KLEECK
Woodstock, New York

REV. CLIFFORD H. VESSEY
White Plains, New York

PROF. PAUL H. VIETH
New Haven, Connecticut

REV. EDGAR M. WAHLBERG
Dearborn, Michigan

THE REV. ARTHUR E. WALMSLEY
Brooklyn, New York

PROF. HARRY F. WARD
Palisade, New Jersey

REV. A. MCRAVEN WARNER
New York, New York

ALFRED H. WASHBURN, M.D.
Denver, Colorado

REV. WM. CAMPBELL WASSER
Boulder, Colorado

PROF. GEORGE H. WATSON
Chicago, Illinois

REV. CHARLES C. WEBBER
Washington, D. C.

MR. GEORGES M. WEBER
Palo Alto, California

REV. BRADFORD G. WEBSTER
Smethport, Pennsylvania

REV. HUGH WARREN WESTON
Marblehead, Massachusetts

REV. GROVER C. WHIMSETT
Santa Cruz, California

MR. JOHN P. WHITMAN
Tarnworth, New Hampshire

PROF. BERTRAM F. WILLCOX
Ithaca, New York

MR. AUBREY WILLIAMS
Montgomery, Alabama

REV. CLAUDE WILLIAMS
Helena, Alabama

MRS. KATHARINE P. WILLIAMSON
Cleveland, Ohio

DR. DOROTHY C. WILSON
Bangor, Maine

REV. ROY M. WINGATE
Gretna, Nebraska

MR. THOMAS WINNETT
Berkeley, California

PROF. THOMAS WOODY
Upper Darby, Pennsylvania

REV. LLOYD F. WORLEY
Hartford, Connecticut

PROF. FRANCIS D. WORMUTH
Salt Lake City, Utah

REV. ELIOT WHITE
Arlington, Massachusetts

B. LORING YOUNG, ESQ.
Boston, Massachusetts

APPENDIX B

Letters of Consent

JOHN J. ABT
ATTORNEY AT LAW
320 BROADWAY
NEW YORK CITY 7 N.Y.
COrtland 7-3110

August 11, 1960

Royal W. France, Esq.
154 Nassau Street
New York 38, N. Y.

Re: Communist Party v. S.A.C.B.
No. 12, Oct., Term, 1960

Dear Mr. France:

This is to inform you that the Communist Party consents to the filing by you in the Supreme Court of the United States of a brief *amicus curiae* in the case.

Very truly yours,

JOHN J. ABT

JJA/s

OFFICE OF THE SOLICITOR GENERAL
Washington, D. C.

58-1 August 17, 1960

Laurent B. Frantz, Esq.
936 Shevlin Drive
El Cerrito, California

Re: Communist Party of the United States
v. Subversive Activities Control Board,
Oct. Term, 1960, No. 12

Dear Mr. Frantz:

Mr. Royal W. France's letter of July 25, and your letter of August 10, ask consent, on behalf of a group of American citizens, to the filing of a brief *amici curiae* in this case. At my request, you have supplied me with a preliminary list of the friends of the Court on whose behalf the brief is to be submitted, and have indicated that further names will probably be added before the brief goes to the printer.

In view of the considerations suggested in your letter and that of Mr. France, and in view of the Court's granting leave to a similar group of *amici curiae* at the earlier stage of this case, 350 U. S. 859, I consent to the filing of the proposed brief.

We would very much appreciate it if your brief could be filed at approximately the same time as the brief of the petitioner, so that we can take account of your arguments in the brief we shall file on behalf of the respondent.

Sincerely yours,

/s/ J. LEE RANKIN
J. Lee Rankin
Solicitor General

cc:
James R. Browning, Esq.
Clerk
Supreme Court of the United States

Royal W. France, Esq.
154 Nassau Street
New York 38, New York